United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2352

To be argued by Donald B. Da Parma

United States Court of Appeals

For the Second Circuit

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

—against—

THE CITY OF NEW YORK; ABRAHAM BEAME as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE. Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

On Remand from the Supreme Court of the United States

BRIEF FOR DEFENDANT-APPELLEE, GROUP HEALTH INCORPORATED

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IN THE

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On Remand from the Supreme Court of the United States

BRIEF FOR DEFENDANT-APPELLEE GROUP HEALTH INCORPORATED

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ISSUES PRESENTED

The issues before this Court which are relevant to the defendant Group Health Incorporated are:

1. Can a defendant who has only played the role of an insurance vendor and is neither an employer, employment agency nor labor organization in relation to the alleged victims of discrimination be held liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq.?

2. Under the Supreme Court's recent decision in Geduldig v. Aiello, 417 U.S. 484 (1974) can plaintiffs state a cause of action under the Equal Protection Clause by alleging discrimination in the benefits paid by an employer for pregnancy and maternity?

3. Under the Supreme Court's recent decision in General Electric Co. v. Gilbert, ___U.S.___, 45 U.S.L.W. 4031 (1976) can plaintiffs state a cause of action under Title VII by alleging discrimination in the benefits paid by an employer for pregnancy and maternity?

STATEMENT OF THE CASE

Plaintiffs complain of sex discrimination due to the pregnancy and maternity leave and benefit policies of the City of New York ("City") and various City agencies, unions and union welfare plans. The action is brought under Title VII of the Civil Rights Act of 1964,42 U.S.C. §2000e, et. seq. ("Title VII"), the Fourteenth Amendment to the Constitution ("Equal Protection Clause"), and various state statutes. Essentially, plaintiffs attack three areas of City policy: a) medical and hospitalization insurance coverage; b) disability benefits coverage; and c) the employee leave policies of the City. Only the first of these three areas, medical and hospitalization insurance coverage, concerns this defendant, Group Health Incorporated ("GHI").

Plaintiffs chose to join, in addition to their employers and unions, two insurance companies which have sold insurance to the City, GHI and Blue Cross and Blue Shield of Greater New York ("the insurance company defendants"). GHI's posture in this case is solely that of an insurance vendor. Essentially, plaintiffs allege that because the City did not purchase additional and more expensive insurance coverage for maternity, the companies selling the insurance are liable to plaintiffs. As to the insurance company defendants, the complaint states only

that they have "aided and abetted" the City because they "negotiated and entered into health and hospitalization insurance contracts which discriminate in their provisions on the basis of sex."(34a)* This claim is the sole ground for liability asserted against the insurance companies.

This action was commenced on January 17, 1974 with the filing of a complaint.(1a) On June 26, 1974, Judge Whitman Knapp wrote to all counsel asking for argument on whether he should, sua sponte, dismiss the complaint in light of the recent Supreme Court decision on pregnancy and maternity benefits in Geduldig v. Aiello 417 U.S. 484 (1974) ("Geduldig").(232a) In response to Judge Knapp's request GHI submitted a motion to dismiss the complaint and for summary judgment. GHI argued that not only did Geduldig require dismissal, but more fundamentally plaintiffs had not stated adequate jurisdiction for a claim for relief against GHI under either Title VII or the Equal Protection Clause.(195a)

After consideration of the matter, Judge Knapp, sua sponte, dismissed the complaint based on the Supreme Court decision in Geduldig.(290a, 313a) Because Geduldig fully disposed of the case there was no need for the District Court to consider GHI's motion for summary judgment and dismissal of the complaint.

* Numbered references followed by "a" refer to pages in the Joint Appendix.

Plaintiffs appealed Judge Knapp's decision to this Court which vacated the dismissal. Several defendants then petitioned the Supreme Court for certiorari. The Supreme Court granted certiorari, vacated the judgment of this Court and remanded the case for reconsideration in light of the more recent decision in General Electric Co. v. Gilbert, 45 U.S.L.W. 4031 (1976) ("Gilbert").

GHI is a New York not-for-profit health service corporation. GHI is not an agency of the City, State or Federal governments.(199a) GHI provides the City's major medical and basic medical and surgical coverage under two plans [GHI and GHI (Type E)]. Both plans provide a set dollar amount of coverage for normal pregnancy ($125 under the Type E plan and $150 under the GHI plan).(213a, pp.30,49) If a participating physician is used the full cost of service is covered.(209a)

Pregnancy is covered equally for female employees and for women covered as dependants under a male employee's policy. Thus, the same benefits are offered to men and women. While of course only women become pregnant, males in some instances receive a similar monetary benefit for a female dependant. (213a, p.5)

GHI is now and always has been ready to sell additional pregnancy coverage to the City, provided the City pays the additional premium involved. The choice of coverage was solely the City's. GHI had no power to force the City to purchase additional coverage. (200a)

Plaintiffs are all employees of the City. In relation to these plaintiffs, GHI is neither an employer, employment agency or labor organization. It is only a vendor of insurance. (201a)

On June 12, 1974, the Equal Employment Opportunity Commission ("EEOC") dismissed the administrative charges of two of the plaintiffs against GHI because GHI was not an employer, labor union or employment agency within the meaning of Title VII. The EEOC stated that it lacked jurisdiction over the claim under Title VII. (204a, f.n. 2)

ARGUMENT

I

THERE IS NO BASIS UNDER TITLE VII FOR IMPOSING LIABILITY UPON A PARTY WHICH IS NEITHER AN EMPLOYER, EMPLOYMENT AGENCY NOR LABOR ORGANIZATION IN ITS RELATION TO THE PLAINTIFFS.

Title VII is clear. It deals with employment and labor practices that might cause discrimination against protected groups. But it does not purport to do more than that. The entire statute speaks only of employers, employment agencies and labor organizations. 42 U.S.C.§2000e, et seq. It nowhere imposes liability on a vendor. But that is what plaintiffs attempt here, because GHI is only a vendor of insurance in relation to plaintiffs.

No matter what the ultimate outcome of plaintiffs' suit, no matter what this or other courts decide is the law governing maternity benefits, only the employer, employment agency or labor organization is liable under Title VII for

the policies which they have chosen which affect maternity and pregnancy. Nor is that unreasonable. Only the employer or labor organization has any power to affect any change in this employment policy. The City chose the insurance policy it wanted to buy for its employees and that is what GHI sold. GHI had no power to order the City to buy more insurance. It was then, and is now, ready to sell additional coverage for an additional premium. But it had no power to change the City's decision that it did not want to buy the extra coverage.

Title VII states that:

> "It shall be an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of...sex..." 42 U.S.C. 2000e-2(a) (Emphasis supplied)

Subparagraphs (b) and (c) similarly prohibit discrimination by employment agencies and labor organizations. By the plain terms of the statute no other parties are included. Nowhere does the statute speak of aider and abettor liability.

The Courts have consistently limited Title VII to employers, employment agencies and labor organizations. In Smith v. Dutra Trucking Co., 410 F.Supp. 513 (N.D. Calif. 1976) the Court concluded that a woman truck driver working as an

independent contractor could not bring an action against the trucking company she contracted with. The Court stated "Plaintiff must therefore show that the relationship allegedly interfered with was in the nature of employment." 410 F.Supp. at 518 (footnote omitted) See, Melanson v. Rantoul, 421 F. Supp. 492 (D.R.I. 1976) (United States not employer of plaintiff employees of college despite federal funding of college).

In Brush v. San Francisco Newspaper Printing Co., 315 F.Supp. 577 (N.D. Calif. 1970), aff'd. 469 F.2d 89 (9th Cir. 1972), cert. den. 410 U.S. 943 (1973) the Court similarly dismissed a charge against the publisher of help-wanted ads because the newspaper did not act as an employment agency when it published the ads. The Court stated:

> "The Civil Rights Act sections now under scrutiny are not made broadly applicable to all 'persons,' but only to 'employer,' 'employment agencies' and 'labor unions.' Since the statute is neither made specifically applicable to newspapers nor made so broadly applicable as to include newspapers, there was no reason for any express exclusion, qualified or otherwise, of newspapers. Indeed, in our opinion, the absence of any such exclusion is persuasive that Congress never contemplated a claim that newspapers were included.
> . . . .
> "Certainly, if the Congress intended to impose on newspapers, not only new responsibilities but also new personnel and procedural activities, it could have and in our opinion would have specified newspapers along with employers, labor unions and employment agencies. It not only did not do so, it clearly expressed its contrary intent in the legislative history leading to the passage of the legislation.

> "If, as plaintiff argues, the legislation would be improved by inclusion of newspapers, such inclusion must be accomplished by the Congress--not by the courts." 315 F.Supp. at 582-583

In the context of legislative intent, the existence of the McCarren-Ferguson Act, 15 U.S.C. §1012(b), should be noted. That statute provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance... unless such Act specifically relates to the business of insurance." At the time this policy was issued it was completely legal to limit benefits for pregnancy under New York State Law. (200a, 210a)

The EEOC has agreed with GHI's position. In dismissing two of the plaintiffs' charges against GHI, the EEOC stated:

> "Charging Parties Robertson and Boyarsky's sworn charges against the above noted Respondents are dismissed for lack of jurisdiction since, as insurance carriers, they are neither employers, labor organizations or employment agencies within the meaning of Title VII." (204a, n.2)

The EEOC has taken the same position in its decisions. A series of cases dealing with EEOC jurisdiction over newspapers publishing help-wanted ads have uniformly dismissed the newspaper defendants. Decision Nos. 75-002, 75-003 (July 29, 1974), 75-004, 75-005 (July 30, 1974), 11 FEP Cases 1498-

1502; Decision No. 74-117 (April 23, 1974) 8 FEP Cases 702. In another case the EEOC held it did not have jurisdiction over a state commissioner of education who had affirmed the dismissal of a teacher by a local board of education, Decision No. 75-030 (Sept. 24, 1974), 12 FEP Cases 1355. The EEOC stated:

> "Respondent State Commissioner lacked the indicia of control over Charging Party's activities that traditionally are associated with an employment relationship. Further Respondent State Commissioner did not initiate Charing Party's termination in this case. His role was limited to holding a hearing and making a decision as to whether Charging Party's dismissal was for 'just cause' under applicable state law." 12 FEP Cases at 1356. (footnotes omitted).

The EEOC explained that what they meant by "indicia of employment" were facts such as "selection, day-to-day control, training and payment." Ibid. f.n.6

There is no imaginable set of facts under which plaintiffs could show that GHI controlled the terms and conditions of these plaintiffs' employment. Only the City could determine what insurance coverage it would purchase.

Plaintiffs attempt to save their complaint by terming the conduct of the insurance company defendants, "aiding and abetting." The sole fact alleged in support of this charge is that the insurance companies negotiated

and signed insurance contracts with the City. Title VII itself does not speak of aiding and abetting. Nor has this defendant found any case law in support of plaintiffs' novel theory against GHI.

Quite to the contrary, the Court in Byrd v. Local Union No. 24, IBEW, 375 F.Supp. 545 (D.My. 1974) summarily rejected a conspiracy allegation against a third party which did business with the employer accused of discrimination. In Byrd plaintiffs complained of the employment practices of various unions and subcontractors. However, the Court held that plaintiffs could not sue a general contractor which did not directly employ or refuse to employ plaintiffs. As to the conspiracy allegation the Court stated:

> "In order for Piracci [the general contractor] to be a member of a conspiracy, it must have agreed, expressly or impliedly, with one or more other entities to inflict a wrong or injury upon another. There must have been a single plan, the essential nature and general scope of which was known to Piracci as the object and purpose of the conspiracy, although each conspirator need not have known the exact limits of the plan or the identity of all the other coconspirators. The mere knowledge, however, that the subcontractors discriminated against the plaintiffs does not make Piracci a member of the conspiracy by continuing to employ the defendant subcontractors, nor does the fact that Piracci has no blacks in its own work force makes it a coconspirator with alleged unlawful discriminators in the absence of any allegation that Piracci has unlawfully discriminated in the selection of its work force." 375 F.Supp. at 558 (citations omitted).

Simple contractual relations were not enough to bring a third party within the ambit of Title VII.

Plaintiff's contention is that GHI purposefully sought to persuade the City to buy less insurance coverage at a lesser premium. Their theory flies in the face of common sense. GHI is now, and was in 1973, completely willing to sell additional insurance.

This basic fault in plaintiff's complaint requires dismissal of the entire case against GHI under Title VII. Even the EEOC has agreed in dismissing the charges of two of these plaintiffs that it is necessary to be an employer, employment agency or labor organization in order to fall within the bounds of Title VII. Plaintiffs' contentions against GHI, if upheld, would make liable parties with no power to affect the complained of practices. That could not be the result intended by Congress in enacting Title VII.

Geduldig alone disposes of plaintiffs' Equal Protection claims.

Even so, there is no discrimination in the insurance coverage at issue. In the insurance plan here, female employees and female dependants of male employees are offered exactly the same coverage for pregnancy and maternity. The same monetary payment is made to males and females for the same event.

The plaintiffs themselves have illustrated just this point. Included in the named plaintiffs is a male, Robert Sussman, who complains of the limited benefits paid to his wife, a covered dependant under the insurance plan. Similarly, plaintiffs define the class as including, "males employed by the City...who...had a wife or female dependent capable of becoming pregnant or who became pregnant." (4a) Plaintiffs, therefore, request relief from the similar treatment given to male and female class members but at the same time complain that males and females are treated differently. That is an absurdity.

The Court in Satty v. Nashville Gas Co., 384 F. Supp. 765 (M.D. Tenn. 1974) agreed that no sex discrimination can be found in an insurance policy that compensates males and females equally for the same event. The Court stated:

II

UNDER THE SUPREME COURT'S DECISION IN GEDULDIG AND UNDER THE TERMS OF THIS INSURANCE PLAN, PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR RELIEF UNDER THE EQUAL PROTECTION CLAUSE.

Despite the insurance company defendants tenuous connection with the core of plaintiffs' case against their employers and labor unions, the plaintiffs have also asserted a claim against GHI and Blue Cross based on the Equal Protection Clause. Surely Geduldig has settled this issue.

In speaking of the exclusion of pregnancy from disability insurance coverage the Supreme Court in Geduldig stated flatly:

> "We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause." 412 U.S. at 494

In explaining its reasoning the Court stated:

> "These policies provide an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from from which women are protected and men are not." 417 U.S. 496-497 (footnotes omitted)

> "There is no doubt that the insurance program makes a distinction in the case of pregnancy as to the extent of benefits available. However, the pregnancy distinction applies to both male and female employee-beneficiaries of the plan. The insurance proceeds are paid on behalf of the employee, male or female, according to a single formula in all pregnancy cases. Thus, for a male employee whose wife is pregnant, the insurance benefit is the same as provided to a pregnant female employee such as plaintiff.
> . . . .
> "So far as the issue relating to the insurance program is concerned, the court finds no distinction in the application, operation, or effect of the insurance plan to support a finding of unlawful discrimination by reason of sex since all employees, male or female, receive the same benefit." 384 F. Supp. at 766-767

See also, EEOC guidelines on fringe benefits, Title 29, C.F.R. §1604.9(d).

Plaintiffs have failed as a matter of law to state a claim for relief under the Equal Protection Clause. Not only does Geduldig preclude their contention but they complain of an insurance plan that compensates males and females equally.

III

PLAINTIFFS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER THE SUPREME COURT'S RECENT DECISION IN GENERAL ELECTRIC CO. v. GILBERT.

In Gilbert the Supreme Court further extended the reach of their decision in Geduldig, concluding that the failure to offer all encompassing pregnancy disability benefits was not a violation of Title VII. The Court in Gilbert held that the Fourth Circuit had misread the prior decision in Geduldig, when it held Geduldig inapplicable to a case under Title VII:

> "Geduldig is precisely in point in its holding that an exclusion of pregnancy from a disability benefits plan providing general coverage is not a gender-based discrimination at all" 45 U.S.L.W. at 4034

No showing of discrimination can be based solely on the fact that more limited benefit coverage is offered for pregnancy. The classification is facially non-discriminatory.

However, plaintiffs in Gilbert argued that even if the classification itself was facially non-discriminatory, the exclusion of benefits had an impermissible impact on a protected group. In Griggs v. Duke Power Co., 401 U.S. 424 (1971) ("Griggs") the Supreme Court had concluded that even a facially neutral employment practice might violate Title VII

if the requisite discriminatory effect on a protected class were shown.

The Gilbert Court could find no basis, however, for the conclusion of discriminatory effect by the limitation on pregnancy benefits. The Court concluded that despite the fact that women might risk an uncompensated period of disability due to pregnancy while men did not, there was no showing of impermissible discriminatory effect:

> "As there is no proof that the package is in fact worth more to men that to women, it is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits; that is to say, gender-based discrimination does not result simply because an employer's disability benefits plan is less than all-inclusive. For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks. To hold otherwise would endanger the common-sense notion that an employer who has no disability benefits program at all does not violate Title VII even though the 'underinclusion' of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other." 42 U.S.L.W. at 4035 (footnotes omitted) (Emphasis of the Court)

In a footnote to its opinion the Court measured the "effect" of the policy by focusing on the additional cost of providing more inclusive benefits:

> "Absent proof of different values, the cost to 'insure' against the risks is, in essence, nothing more than extra compensation to the employees, in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the 'insurance', there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the 'extra' disabilities due to pregnancy." Ibid, f.n. 17

Unquestionably the same effect of providing limited pregnancy coverage results in this case, and the Supreme Court has concluded that the effect is lawful. It will cost more to insure female employees and dependents against the extra risk and the Supreme Court has stated that the employer need not pay to insure against pregnancy. If the Supreme Court could find no impermissible effect on the protected class in Gilbert then none can possibly be shown by plaintiffs here. Gilbert as fully disposes of the Title VII aspects of this case as Geduldig does of the Equal Protection aspects.

CONCLUSION

Plaintiff's complaint should be dismissed in its entirety as to defendant GHI. GHI is neither an employer, employment agency nor a labor organization and therefore does not come within the bounds of Title VII. Under the Supreme Court decisions in Geduldig and Gilbert plaintiffs cannot state a claim for relief based on the exclusion of pregnancy benefits from an insurance policy.

Dated: New York, New York
May 18, 1977

Respectfully submitted,

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STATE OF NEW YORK)
: SS:
COUNTY OF NEW YORK)

The undersigned, being duly sworn, deposes and says that she is not a party to this action, is over 18 years and resides in the County of Kings . That on the 17th day of May, 1977 she served, upon the following, the within BRIEF FOR DEFENDANT-APPELLEE, GROUP HEALTH INCORPORATED:

Mirkin, Barre, Saltzstein & Gordon, P.C.
98 Cuttermill Road
Great Neck, New York 11021
Attorneys for SOCIAL SERVICE EMPLOYEES, LOCAL 371 UNION and SOCIAL SERVICE EMPLOYEES, LOCAL 371 UNION WELFARE FUND

(Per agreement to serve by mail between Robert M. Ziskin, Esq., and Diana E. Pinover, Esq.)

by placing a true copy of same securely enclosed in a post paid wrapper and delivering same to our mail clerk who, in turn, in the ordinary course of business, brought it to the mail room and then mailed same by delivering it in an official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Sworn to before me this

17th day of May, 1977

Sara Greenfield
Sara Greenfield

Suzan Grossman Landaeta
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